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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSE TORRES,

Petitioner,

v.

HAROLD GRAHAM, Superintendent,
Auburn Correctional Facility,

Respondent.

ORDER
06-CV-508S

Currently before the Court are Petitioner's pro se Motions to Stay the instant Habeas Corpus Petition. (Docket Nos. 9 and 14). Petitioner's First Motion to Stay was filed on October 23, 2006. (Docket No. 9). He filed an "Amendment" to that Motion on January 9, 2007. (Docket No. 13). In that Motion, Petitioner requested the Petition be held in abeyance in order to allow him to fully exhaust his state court remedies regarding an ineffective assistance of appellate counsel claim currently raised in the Petition. (Docket No. 1, Petition, ¶ 12A–Ground One). At the time of filing the Motion, Petitioner was awaiting a decision from the New York Court of Appeals on his application for an extension of time to seek leave to appeal from the denial of a Writ of Error Coram Nobis raising the ineffective assistance of appellate counsel claim. (Docket. Nos. 9 and 13).¹

¹Petitioner's Amendment to the First Motion for a Stay (Docket No. 13) notes that he was advised by the New York Court of Appeals that his request for leave to appeal was not untimely because the District Attorney's Office had not served him with a copy of the Appellate Division's Order denying his Application for a Writ of Error Coram Nobis. Petitioner thereafter filed an application for leave to appeal and re-filed his request for an extension of time to file an application for leave to appeal in the event the Court of Appeals determined that his time to seek leave to appeal had expired.

On June 6, 2007, Petitioner filed the Second Motion for a Stay so that he could exhaust state court remedies with respect to a “newly discovered evidence claim of actual innocence.” (Doc. No. 14). Petitioner’s Second Motion for a Stay also requests permission to amend the Petition to include the unexhausted claim of actual innocence.

In his “Affirmation in Support for Stay and Amend Petition,” Petitioner notes that the New York State Court of Appeals denied his request for leave to appeal from the denial of his Writ of Error Coram Nobis on May 1, 2007. (Doc. No. 14, ¶ 3).² Petitioner has thus exhausted his state court remedies with respect to the ineffective assistance of counsel claim. Accordingly, Petitioner’s First Motion for a Stay is moot and is **DENIED** as such.

With respect to Petitioner’s Second Motion for a Stay and to amend the Petition to add a claim of actual innocence based on newly discovered evidence (Docket No. 14), Respondent shall submit a response to the Motion in the form of affidavits and briefs pursuant to Local Rule of Civil Procedure 7.1 by **November 2, 2007**. Petitioner may have until **November 16, 2007** to submit a reply to the responding papers. The court will deem the matter submitted on **November 16, 2007**, and will issue a decision after review of the papers.

²Paragraph 3 of this same Affirmation states that the Court granted Petitioner’s renewed Motion for a Stay or, what is referred to herein as the “First Motion for a Stay.” The Court, however, never granted Petitioner’s Motion for a Stay. In fact, prior to Petitioner’s First Motion for a Stay, Petitioner had filed an earlier Motion for a Stay (Docket No. 5), which the Court denied without prejudice to re-filing upon an adequate showing that Petitioner was entitled to a stay under *Rhines v. Weber*, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1534, 161 L. Ed. 2d 440, 450 (2005). (Docket No. 8). The First Motion for a Stay, which is addressed herein, was what Petitioner filed following the denial of his earlier Motion for a Stay.

The Clerk of the Court is directed to forward a copy of Petitioner's Motion (Doc. No. 14) to the attorney appearing for the Respondent herein.

SO ORDERED.

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

Dated: September 28, 2007
Buffalo, New York